STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Sage Telecom, Inc.	:	
	:	
Petition for Arbitration of an	:	
Interconnection Agreement with	:	
Illinois Bell Telephone	:	**03-0570**
Company d/b/a SBC Illinois under Section	:	
252(b) of the Telecommunications Act	:	
of 1996.	:	

PROPOSED ARBITRATION DECISION

By the Commission:

I. PROCEDURAL BACKGROUND

This proceeding was initiated by a Petition for Arbitration ("Petition") filed with this Commission on September 17, 2003 by Sage Telecom, Inc. ("Sage"), pursuant to subsection 252(b) of the federal Telecommunications Act of 1996 ("Federal Act")[1] and 83 Ill.Adm.Code 761, to resolve certain disputed issues with Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"). SBC is an incumbent local exchange carrier ("ILEC") in certain geographic areas of Illinois. Sage is a competitive local exchange carrier ("CLEC") seeking to establish an interconnection agreement ("ICA") with SBC in order to provide telecommunications services in areas in which SBC also provides services. The Petition includes a proposed ICA[2].

SBC filed its Response to Sage's Petition on Oct. 14, 2003 ("Response"). SBC also presented an additional disputed issue for resolution, as it is permitted to do under subsection 252(b)(4) of the Federal Act[3]. The Staff of this Commission also participated in this proceeding.

An Administrative Law Judge ("ALJ") conducted pre-trial hearings on September 24 and October 22, 2003, and evidentiary hearings on October 23 and 27, 2003, in Chicago, Illinois. Sage presented the testimony of Stephanie G. Timko (Sage Ex's. 1.0, 2.0 and 2.0P). SBC presented the testimony of Roman A Smith (SBC Ex's. 1.0 and 1.1) and June A. Burgess (SBC Ex. 2.0 and 2.0P). Staff presented the testimony of Dr. James A. Zolnierek (Staff Ex. 1.0) and Jeffrey H. Hoagg (Staff Ex. 2.0). (Dr. Zolnierek adopted Mr. Hoagg's testimony as his own for the purpose of cross-examination). At

[1] 47 U.S.C. § 252(b).
[2] Attachment 2 to the Petition.
[3] 47 U.S.C. § 252(b)(4).

the conclusion of the October 27, 2003 hearing, the evidentiary record was marked "heard and taken."

Initial and reply briefs (respectively, "Init. Br." and "Rep. Br.") were filed by Sage, SBC and Staff. An ALJ's Proposed Arbitration Decision was served on all parties. Briefs on exceptions ("BOEs") were filed by…

II. JURISDICTION

Subsection 252 of the Federal Act provides that within a specified time period "after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Both Sage's Petition and SBC's Response assert that there are open issues between the parties. There is no dispute that the Petition was timely filed. Consequently, the Commission has jurisdiction to arbitrate the issues presented and to require that the Commission's resolution of those issues be reflected in an interconnection agreement between the parties.

Section 252 of the Federal Act proscribes certain procedures, standards and outcomes for arbitrations conducted under that section. In addition, the Commission has adopted rules and procedures for such arbitrations in 83 Ill.Adm.Code 761. The foregoing federal and state provisions apply to this proceeding.

III. ISSUES FOR RESOLUTION.

A. OPEN ISSUES PRESENTED BY SAGE

In general, Sage's open issues concern Alternate Billed Services ("ABS"), which are "calls that are billed to a telephone number other than the number from which the call was placed."[4] SBC Ex. 2.0 at 4. These include collect calls, calling card calls and "billed to third" calls. *Id*. More specifically, Sage's issues concern whether and how Sage will bill and collect for ABS originated by SBC local exchange customers, or by customers of other telecommunications carriers at points of origin subscribed to SBC's local exchange service, and terminated at points subscribed to Sage's local exchange service. Calls billed to the terminating Sage customer are referred to as "Incollects." ABS traffic flowing in the opposite direction (i.e., calls terminated by SBC's local exchange customers) are denominated "Outcollects". (There are no disputed issues concerning Outcollects in this proceeding.)

1. Can SBC impose upon Sage, as a precondition to providing interconnection, an obligation that Sage act as the billing and collection agent for third-party billed calls originated by SBC's customers?

[4] Within the telecommunications industry, such calls are also referred to as Alternatively Billed Traffic or "ABT."

Exhibit 2 to the Petition consists of what Sage describes as an "undisputed" ICA between Sage and SBC. Petition, para. 2, fn. 2. Moreover, Sage asserts, "[t]he parties have agreed to terms of interconnection pursuant to negotiations completed under [the Federal Act]." *Id*., para. 13. Sage contends, however, that "SBC is withholding signature on that [ICA] unless Sage executes a billing and collection contract for Incollect calls." *Id*., para. 14. Accordingly, Sage "requests this Commission to enter an order finding that SBC cannot force, as a precondition to interconnection, Sage to act as the Billing and Collection agent for…third party calls originated by SBC's customers." *Id*. (final page).

SBC replies that what Sage characterizes as an "undisputed" ICA already provides that each party will bill and collect for ABS traffic terminated by its respective local exchange customers. Response at 1-2, citing Petition, Ex. 2, sections 27.16.2 & 27.16.3. Therefore, SBC argues, Sage has already voluntarily agreed to be SBC's ABS billing and collection agent, thereby rendering Sage's Issue 1, as framed above, "moot." *Id*., at 1. Assuming that the issue of *whether* Sage will bill and collect for SBC-originated ABS is thus removed from arbitration, SBC contends that the only remaining open issue is *how* Sage will perform such billing and collection.

Staff concurs with SBC that Sage Issue 1, as set forth above, is moot because the Sage has already accepted ABS billing and collection responsibility in the ICA attached to the Petition. Staff Ex. 1.0 at 5-6. Indeed, Staff asserts, "if the Commission were to order the removal of all rates, terms and conditions related to incollect calls from the [ICA], then the Commission would need to reject Sage's proposal to approve" the ICA accompanying the Petition. *Id*., at 7.

The Commission finds that the essential flaw in Sage's Issue 1 is not that it is moot, but that Sage casts doubt on whether it really wants that issue arbitrated. By attaching to its Petition an "undisputed" ICA that provides for ABS billing and collection, and by requesting that the Commission adopt that ICA, Sage appears to abandon its own position on Issue 1 (that billing and collection services are unregulated and, for that reason, do not belong in an ICA[5]). However, Sage does not actually want the Commission to adopt the attached ICA with an ABS billing and collection provision. Rather, Sage's preference is that the Commission delete that provision, or, as a less desirable alternative (from Sage's standpoint), add another provision to the ICA that shields Sage from financial responsibility for ABS uncollectibles[6].

Thus, as SBC states, "Sage is wrong in suggesting that the parties have agreed on *all* of the terms of the ICA." Response at 2 (emphasis in original). The ICA attached to the Petition is really a document containing *disputed* language. Sage would resolve that dispute by prevailing on Issue 1, with a Commission finding that billing and collection provisions are barred from, or at least inappropriate to, an ICA. Accordingly, despite the contradictory elements in the Petition, Sage Issue 1 remains alive.

[5] E.g., Petition, para. 16.
[6] Specifically, Sage would amend Section 6.3.4.1 of the ICA to provide that Sage "will not be liable for Alternatively Billed Service (ABS)." Petition, para. 31.

That said, Sage Issue 1 is drafted too rhetorically. It is self-evident that SBC cannot "impose" terms or "preconditions" upon an ICA under the Federal Act. SBC can *propose* terms, and its counterpart in an ICA is free to disagree and insist that we arbitrate the dispute. It is this Commission that imposes terms, not the disputing parties. Consequently, Sage Issue 1 must be construed to pose these less rhetorical questions – do we have the authority to require that ABS billing and collection terms be included in an ICA, and, if so, should we exercise that authority in this instance? If the answer to those questions is affirmative, then we will address Sage Issue 2 to determine what terms will apply in this instance. If not, we will strike subsections 27.16.2 and 27.16.3 from the ICA attached to the Petition, and approve the undisputed remainder (after considering SBC's Issue 1).

Sage emphasizes that the Federal Communications Commission ("FCC") has determined that billing and collection services are not subject to regulation under the Federal Act, and that the FCC has declined to assume ancillary jurisdiction over such services. Petition, para. 15, citing In the Matter of Detariffing of Billing and Collection Services, FCC Dckt. 85-88, Report & Order, 102 FCC 2d 1150, para. 32 (rel. January 29, 1986). Sage contends that, for those reasons, the Michigan Public Service Commission rejected SBC's attempt to include ABS billing and collection terms in an ICA. "ABS is an unregulated billing and collection service, the terms of which may be worked out by the parties without the need for arbitration as part of the interconnection agreement." In the Matter of Michigan Bell Telephone Company d/b/a SBC Michigan, Case No. U-13758, Opinion & Order (Aug. 18, 2003) ("Michigan Arbitration Order").

Sage also cites a decision by the Texas Public Utilities Commission in a consolidated proceeding that involved both a complaint by Sage against an SBC affiliate and an arbitration requested by Sage and several other CLECs with that same SBC affiliate[7]. In that proceeding, the Texas Commission adopted the following conclusion of the arbitrators:

> The detail and complexity of the issues related to [ABS] over the UNE[8] platform, the parties' disagreements over even the basic definitions of terms, and the fact that [ABS] issues involve multiple carriers, not merely the parties to the interconnection agreement, all support a finding that [ABS] over the UNE platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement. Where parties are unwilling or unable to develop a comprehensive billing agreement to address [ABS], then the provider of the

[7] Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE-P Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996, PUCT Docket No. 24542, Revised Arbitration Award (Oct. 3, 2002) ("Texas Arbitration Order").
[8] "UNE" is the acronym for "unbundled network elements."

> Incollect or Outcollect services shall bill the end user customer directly.

Texas Arbitration Order, at 212. Based on the foregoing authorities, Sage argues that the ICA in the present case should not include ABS billing and collection provisions.

SBC counters that the billing and collection services addressed in the FCC decision relied upon by Sage "were services provided by local exchange carriers to *interexchange* carriers ["IXCs"] for the billing and collection of charges for *interstate* services." SBC Init. Br. at 9 (emphasis in original). In this case, SBC avers, the Commission's authority to require inclusion of ABS billing and collection provisions in an ICA between an ILEC and a CLEC "emanates from Sections 251 and 252 of the [Federal] Act, which established a regulatory scheme governing …the provision of UNEs that was not in effect when the FCC issued its 1986 Decision." *Id*.

Furthermore, according to SBC, this Commission can require that ABS billing and collection provisions be included in an ICA because:

> The ABS traffic at issue here is a form of telecommunications service which is carried over the UNE-P [unbundled network element platform] lines and terminates at the UNE switch port of the UNE platform used by Sage to provide service to its own customers…Moreover, the ability of Sage's customers to accept collect calls and other ABS calls is an important aspect of the local dial tone service provided by Sage to its customers using the UNE Platform…Thus, pursuant to its authority to ensure that the ICA contains reasonable terms and conditions governing the UNE-P, the Commission can, and should ensure that the ICA includes reasonable terms and conditions governing the parties' arrangements for the billing, collection and settlement of charges for ABS traffic.…

Id. at 7-8.

Additionally, SBC stresses that this Commission has previously approved "numerous ICAs that include ABS terms and conditions." *Id*., at 10[9]. SBC also emphasizes that Sage has voluntarily agreed to the inclusion of ABS billing and collection terms in ICAs in other states, including Michigan and Texas (the states that produced the regulatory decisions that Sage relies upon for the principle that ABS billing and collection terms should be excluded from ICAs). *Id*.

[9] In particular, SBC cites the ICAs approved in: CloseCall America, Inc., Docket No. 03-0352; EZ Talk Communications, LLC, Docket No. 03-0404; Kentucky Data Link, Inc., Docket No. 03-0172; Line 1 Communications, LLC, Docket No. 03-0102; Midwestern Telecommunications, Inc., Docket No. 02-0789); and PersonalOffice, Inc., Docket No. 03-0250.

Staff's position is that subsection 252(b)(1) of the Federal Act simply requires this Commission to resolve "open issues" in arbitration proceedings, in a manner consistent with the provisions of Section 251 of the Federal Act, and that there is "nothing in section 251 prohibiting an [IAC] from including terms and conditions regarding the billing, collection and settlement of charges for ABS calls and associated charges of ABS." Staff Init. Br. at 11. Staff bases this position on the conclusions of the FCC's Common Carrier Bureau (acting in the place of the Virginia Corporation Commission)[10] and a United States District Court [11].

The Commission agrees with SBC and Staff that, in general, ABS billing and collection terms *can* be included in an ICA. All parties have cited regulatory proceedings (including ours) and prior agreements by telecommunications carriers (including Sage and SBC) that incorporated such terms. Furthermore, we hold that the question of whether such terms *should* be included in any particular ICA, as well as questions regarding the specific terms to be included, are proper "open issues" in an arbitration proceeding like this one[12]. The authorities on which Sage relies do not compel contrary conclusions. Instead, the language and rationale of both the Michigan[13] and Texas[14] commissions is consistent with our belief that ABS terms *can* be included in an ICA and that the question of whether such terms *should* be included is a proper open arbitration issue under the Federal Act.

Thus, to the extent that Sage Issue 1 asks whether we have the power to require the inclusion of ABS billing and collection terms in an ICA, we answer in the affirmative. That leaves the question of whether we *should* wield that power in this instance. Sage argues that we should not. Insofar as the basis for Sage's argument is that billing and collection are unregulated by the FCC, the Commission is unpersuaded. We see no apparent policy rationale that would support excluding such services from ICAs solely because the FCC declines to regulate them. Indeed, the contrary proposition – that an inter-carrier agreement lessens the uncertainty associated with unregulated services –

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[10] In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission regarding Interconnection Disputes With Verizon Virginia Inc., CC Docket No. 00-218; CC Docket No. 00-251, 2003 LEXIS 4821 (Rel. Aug. 29, 2003), para. 703 ("[t]he only limitations that section 252(b)(4)(C) and (c) place upon any individual issue addressed during arbitration are that the issue must be an 'open issue,' and that resolution of the issue does not violate or conflict with section 251").

[11] US West v. Minnesota Public Utilities Commission, 55 F.Supp.2d 968, 986 (Minn. 1999) ("[n]ot every issue included in the resolution necessarily involves the affirmative requirements of § 251. Thus, the only limitations that § 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251").

[12] We note that Sage has not always carefully delineated whether it is arguing that ABS terms *cannot* or *should not* be included in an ICA. In any event, we resolve both questions here.

[13] Michigan Arbitration, at 47(ABS terms "may" be addressed outside of an arbitrated ICA).

[14] Texas Arbitration Order, at 212 (ABS billing should remain outside of ICAs for *factual* and *practical*, rather than legal, reasons).

is more compelling. The resulting question for the Commission, therefore, is whether the better place for that agreement is within an ICA or a separate agreement.

In Sage's view, the Michigan and Texas arbitration orders discussed above resolve that question. However, the Michigan Arbitration Order offers no additional guidance[15], because its sole stated rationale for excluding ABS billing and collection from the ICA there is that such services are unregulated. As we stated in the preceding paragraph, we do not embrace that rationale. The Texas Commission, however, does provide additional reasoning for its decision to defer ABS billing and collection to a separate agreement (or, absent agreement, to direct billing by the initiating carrier). As quoted above, Texas emphasizes the complexity of the issues, the parties' disagreement over fundamental terms, and the fact that carriers other than the contracting parties are involved in ABS traffic.

In response, SBC contends that:

> The inclusion in the ICA of reasonable terms and conditions governing ABS services… will provide the parties with clear guidelines on matters such as call blocking, record handling, provisions [sic] of services, billing, as well as subject these matters to the ICA's dispute resolution clause. This consistency will provide clarity to the parties regarding their respective responsibilities, which will, in turn, benefit customers in Illinois.

SBC Init. Br. at 8.

The Commission concludes that, in this instance, the preferable course is to include ABS billing and collection provisions in the ICA between Sage and SBC. The valid concerns of the Texas Commission do not trouble us here. The complexity of the issues is not overwhelming (in part, because the carriers have apparently refined those issues in the wake of the Texas Arbitration Order[16]); the parties' disagreements here focus more on policy than on definitions; and SBC is offering to diminish the involvement of additional carriers in this dispute by retaining a degree financial responsibility for third-party ILECs' ABS traffic[17]. Consequently, we can accord greater weight to the benefits that SBC predicts from inclusion of ABS billing and collection terms in the Sage-SBC ICA.

Moreover – and of equal importance – we note that Sage itself has recently elected to opt into ICAs containing ABS billing and collection terms in Michigan and

[15] The decisions of sister commissions can only offer guidance – based on the weight of their reasoning - since we are not obliged to follow their rulings.
[16] Petition, para's 27-28.
[17] SBC Ex. 1.0, Attach. 1, Sec. 2.2 ("Option 1"). Under Section 2.3 ("Option 2"), it appears that a percentage of third-party ILEC charges could be remitted to SBC along with SBC-originated ABS charges. Under Section 2.4 ("Option 3"), SBC would apparently retain 30% of financial responsibility for other carriers' ABS traffic.

Wisconsin. Petition, para. 27. Further, those ICAs contain ABS billing and collection language that "is also identical to the language that SBC and Sage have in their [ICA] that the Texas Commission has already reviewed and approved." *Id*. Since Sage has repeatedly and voluntarily included ABS billing and collection terms in ICAs, we find it appropriate to require the parties to do so here. We will therefore proceed to resolve the parties' dispute regarding the specific terms to govern ABS billing and collection (Sage Issue 2), enabling the parties to proceed under settled terms and conditions for this contentious element in their relationship as interconnected telecommunications providers[18].

In sum, we resolve Sage Issue 1 by ruling, as requested by SBC, that we can and will exercise our discretionary authority to require that the Sage-SBC ICA contain ABS billing and collection terms.

2. If the Answer to Issue 1 is yes, can SBC impose on Sage an obligation to act as a guarantor to ensure payment to SBC for Incollect charges, which are associated with certain SBC-provided calls, such as collect calls, calling card calls, and third-party calls, that are not originated by a Sage customer, but rather are accepted by a Sage customer?

a. Parties' Positions and Proposals

Initially, the Commission believes that Sage Issue 2, like Sage Issue 1, is drafted too rhetorically. Again, no carrier can "impose" terms or conditions upon another in an ICA under the Federal Act. Carriers propose terms and, when called upon, we arbitrate their disagreements. Accordingly, we will reframe Sage Issue 2, without compromising its essence, as follows: should the Commission obligate Sage to accept financial responsibility for ABS traffic originated through SBC and, if so, what should be the magnitude, terms and conditions of that responsibility?

As a practical matter, the parties' dispute regarding financial responsibility can be specifically focused on bad debt. Generally speaking, the parties do not require arbitration to address *recoverable* ABS charges. They have devised procedures for sharing the necessary information to enable Sage to bill, collect and remit collected charges to SBC, in return for a per-message fee. The dispute framed by Sage's Issue 2 concerns allocation of financial loss when a customer *fails to pay* ABS charges. Sage witness Timko describes this as the "real issue" raised by Sage Issue 2 ("what is Sage's liability if any, when an SBC ABS Customer refuses to pay the charges for SBC's competitive ABS charge"). Sage Ex. 2.0, at 5. SBC also casts this as the "real issue," SBC Ex. 1.0 at 24, while Staff similarly characterizes it as the "key issue." Staff Ex. 2.0, at 6.

Sage proposes two provisions, which would appear, respectively, at Sections 6.3.4.1 and 27.16.3 of Sage's proposed IAC[19]. The provision directly implicated in

[18] As Sage suggests, it would not be constructive to "defer this issue…to a later day." Sage Ex. 2.0 at 5.
[19] Petition, Ex. 2.

Sage's Issue 2 – the "Sage Liability Provision" - appears in Section 6.3.4.1. It resolves the dispute simply: "CLEC will not be liable for …ABS." Sage Ex. 1.0 at 25-26. In effect, the Sage Liability Provision would assign all financial responsibility for unrecovered ABS charges, for calls placed to Sage customers, to SBC.

In contrast to Sage's all-or-nothing allocation of financial responsibility for ABS charges, SBC's proposal – the "SBC Liability Provision" – presents three options, two of which would divide responsibility between the parties (with Sage assuming the greater share). Option Two allows Sage to recourse to SBC up to 35% of all ABS messages as uncollectibles, thereby capping Sage's financial responsibility at 65% of those charges. Option Three permits Sage to purchase ABS accounts receivable for a discount of 30% off the face value of those accounts[20]. Option One approaches the dispute differently, by obligating Sage to block ABS calls to its end users, so that few, if any, ABS charges would need to be recovered. Staff asserts that the SBC Liability Provision is preferable to Sage's. Staff Init. Br. at 16-17.

Sage offers several reasons why this Commission should adopt the Sage Liability Provision. First, Sage points to the Texas Commission's ruling that Sage "should not be responsible or liable to [SBC] for any [ABS] charges that are uncollectible." Texas Arbitration Order, at 213. The Texas Commission stressed that the "relatively small amount of compensation [five cents per message] paid to the CLEC [for ABS billing and collection], while presumably sufficient consideration for billing, defeats the suggestion that CLECs have liability for uncollectible charges[21]." *Id*.

Second, Sage insists that five-cent fee "doesn't even come close to matching the direct administrative costs associated with performing the role [of billing and collection agent]." Sage Init. Br. at 16. "The evidence is undisputed that each and every ABS bill Sage submits to its end users on behalf of SBC costs Sage $1.07." Sage Ex. 2.0, at 8. "Further, Sage incurs additional costs… for responding to customer inquiries and complaints about ABS charges that Sage is unable to verify or process because all necessary data is in the hands of SBC; the costs of any late notices that have to be mailed out…and, any other costs associated with collecting late payments." Sage Init. Br. at 16.

Third, Sage maintains that it should not "be responsible for the ABS charges incurred as a result of SBC marketing its ABS services to an SBC customer, that SBC customer choosing to use SBC's ABS services, routing the call through SBC's operator services, rating the call based upon SBC's tariffed rates and terminating to an end user without Sage's consent or knowledge of the call." *Id*., at 21. Furthermore, Sage emphasizes, the revenues associated with Incollect traffic accrue to SBC, not Sage. Sage Ex. 1.0 at 28-29. Additionally, in the event that a customer disputes an SBC ABS charge, Sage avers that it has no authority to "modify, waive or delete" such charges. Sage Init. Br. at 24. In essence, Sage's argument is that the relevant ABS traffic

[20] In discussions between the parties, SBC offered to "slightly raise" this discount. SBC Ex. 1.0 at 18.
[21] Apparently, a five-cent per message fee would also be applied between the parties here. E.g., SBC Ex. 1.0 at 17 & 20.

"belongs to" SBC, so that SBC should bear the risk of uncollectibles associated with that traffic.

Fourth, Sage avers that, in other states, SBC and Sage have already negotiated a set of business practices that govern their respective responsibilities for billing and collecting ABS charges - practices that impose no financial responsibility on Sage for ABS uncollectibles. *Id*., at 25. "These business practices are the norm between SBC and Sage in each and every state in which Sage currently operates." *Id*. Moreover, Sage emphasizes, SBC's own witness has characterized SBC as "pleased" with these practices[22]. *Id*., at 10, citing SBC Ex. 1.0 at 24.

Fifth, Sage emphasizes that SBC's billing and collection agreements with IXCs, including SBC's affiliated long distance provider, permit "full recourse" back to the originating carrier, while SBC's Liability Provision here does not. *Id*., at 22. Although SBC justifies this disparity on the ground that its ABS traffic with IXCs is "one-way" (because IXCs do not accept collect calls from ILECs, Tr. 238-40 (Smith)), Sage replies that Sage-SBC ABS traffic would, in effect, also be "one-way." This is so, Sage, avers, because of the "massive imbalance" between ABS traffic flowing toward UNE-P CLECs from SBC, versus the CLEC traffic flowing to SBC[23].

Sixth, Sage cautions that liability for ABS uncollectibles would jeopardize Sage's financial viability and, by implication, its ability to provide competitive telecommunications services in Illinois. In particular, Sage points to the potential for "significant detrimental impact to Sage's audited financials such as revenues and margin percentages, negative cash flow, false receivable balances…and bad debt ratios." Sage Ex. 1.0 at 30. The result, Sage says, could be an increase in Sage's cost of credit. *Id*. In contrast, if Sage were merely SBC's billing agent, without responsibility for uncollectibles, it would "not have to show the uncollectible Incollect charges as debt and liability." *Id*., at 31.

SBC takes a different view with respect to the "ownership" of ABS calls and their associated charges. SBC emphasizes that "it is Sage's end users who have willingly authorized and accepted the ABS calls." SBC Init. Br. at 11. Staff agrees. "[I]t seems clear that if Sage customers authorize an ABS call, they should pay for it." Staff Init. Br. at 19.

Furthermore, SBC argues, Sage should share the foregoing responsibility for ABS charges with its local exchange customers. "The ability of Sage's customers to receive Incollect calls is a service provided by Sage to its customers using the UNE-P."

[22] However, SBC's witness also said that SBC's pleasure with the parties' business practices is tempered by the absence of any cap on the amount of ABS uncollectibles that Sage can recourse back to SBC. SBC Ex. 1.0 at 25; Tr. 226 (Smith).

[23] The data Sage cites, which was derived from SBC, are confidential and, for that reason, will not be set out in this Order. Sage Cross-Ex. 6P. The data do show that the amount of ABS traffic flowing from the pertinent CLECs to SBC is negligible. Moreover, Sage asserts that it "does not submit any ABS charges to SBC for billing." Sage Rep. Br. at 20. SBC responds that the data pertain to only one CLEC. SBC Rep. Br. at 13.

SBC Init. Br. at 11. Moreover, SBC contends, Sage is "reluctant" to block its customers' capacity to accept collect calls, which "confirms that the ability of its customers to accept ABS calls is viewed by Sage and its end users as a critical element of the dial tone service provided by Sage using the UNE Platform." *Id*. Further, "as the originating carrier, SBC Illinois does not have a business relationship with Sage's end user customers…Thus, Sage is in by far the best position to actually bill and collect Incollect ABS charges authorized and accepted by Sage's customers." *Id*., at 11-12. SBC cites two FCC decisions, In the Matter of Application by Verizon New Jersey Inc. et al., WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, para. 163 (rel. June 24, 2002), and In re: Application of Verizon Maryland et al., WC Docket No. 02-0384, Memorandum Opinion and Order, FCC 03-57, para. 58 (rel. March 19, 2003), in support of the principle that all telecommunications carriers should be responsible for charges incurred by their customers. *Id*., at 13-14.

Second, SBC claims that SBC's Liability Provision is "supported by the standard industry practice as it relates to the exchange of local ABS traffic between ILECs and between ILECs and facilities-based CLECs (i.e., CLECs which own their own switches)." *Id*., at 12. Pursuant to that purported industry practice, "[t]he terminating LEC is responsible for remitting payment for 100% of the rated billable charges accepted by its end users and does not have the right to recourse any amount of those charges to the originating LEC." *Id*., at 12-13.
For example, "under SBC's ABS billing and collection arrangement with its out-of-region CLEC affiliate, that affiliate has no recourse rights back to SBC." *Id*., at 15, citing Tr. 240-241 (Smith).

Third, SBC argues for symmetry with "the manner in which SBC Illinois treats Outcollects, i.e., ABS calls originated by Sage and authorized and accepted by an SBC end user…SBC does not recourse any uncollectible debt back to Sage; instead, it accepts full responsibility for its end users and the bad debt risks inherent in the industry."[24] *Id*., at 14.

Fourth, SBC maintains that "it is necessary to…provide Sage with appropriate incentives to employ reasonable collection efforts and to ensure that a reasonable amount of the ABS charges incurred by Sage's customers, and owed to SBC Illinois, will actually be collected and remitted to SBC Illinois." *Id*., at 16. According to SBC, Sage has "consistently recoursed uncollectible bad debt back to SBC…[at] an uncollectible rate far exceeding the industry average[25]." *Id*., citing SBC Ex. 1.0 at 19, and SBC Ex. 2.0, at 12. According to SBC, the industry average for ABS uncollectibles ranges from 15% to 20% of ABS charges. SBC Ex. 1.0 at 19.

[24] As previously noted, Sage asserts that the amount of ABS traffic flowing to SBC from UNE-P CLECs is negligible.
[25] The data SBC cites is purportedly confidential and, for that reason, would not be set out in this Order. However, SBC Ex. 1.0, which is not confidential, indicates at page 24 that Sage has treated over 90% of ABS charges as uncollectible "in some states." In any case, both the confidential and public data reflect uncollectible rates that appear inconsistent with sound business practices.

SBC opines that Sage's "extremely poor collection rates" can be attributed to, *inter alia*, Sage's practice of billing for ABS calls "in a separate envelope [that is]…sent out separately from the invoice for the other [i.e., Sage's own] services." *Id*., at 17. Additionally, while Sage "makes follow-up calls by telephone to customers who are past due on payments of their local and long distance bills, Sage does *not* make such follow-up calls to customers who are past due on payment of ABS charges[[26]]." *Id*., at 18 (emphasis in original).

Similarly, Staff characterizes Sage's ABS collection rates as "short of adequate," which "strongly suggests that under the ABS billing practices utilized by Sage in other states, it apparently has insufficient financial incentive to effectively pursue collection of ABS-associated charges (and thus minimize uncollectibles for such calls)." Staff Init. Br. at 20. Staff cites the statement of Sage's own witness that "'Sage's collection efforts in general for our active customers aren't strong.'" *Id*., citing Tr. At 293 (Timko).

Fifth, with respect to the Texas Arbitration Order relied upon by Sage, SBC states that its proposed allocation of responsibility for ABS bad debt in the Texas proceeding "was far less generous than the one proposed to Sage in this case[[27]]. At that time, SBC proposed a maximum cap of Uncollectibles of ten percent …SBC has significantly raised the cap percentages in [this proceeding]." *Id*., at 25-26.

Sixth, SBC endeavors to deconstruct Sage's assertion that each ABS bill costs Sage $1.07. In SBC's view, this amount reflects the cost of Sage's decision to bill ABS charges in a separate mailing, apart from the bills for Sage's own services. *Id*., at 26. SBC contends that such practice deviates from the industry standard. *Id*.

Seventh, objects to Sage's suggestion that SBC bill Sage customers directly for ABS charges. According to SBC, Sage customers would be confused by the receipt of bills from SBC, particularly when the customer has switched from SBC to Sage for local exchange service. *Id*., at 28. Staff echoes this concern. Staff Init. Br. at 19. Additionally, SBC insists that direct billing "would require SBC Illinois to implement prohibitively expensive charges to its billing systems. SBC Illinois would have to develop a separate billing system to bill end-users that have no business relationship with SBC Illinois." *Id*.

In addition to the Staff arguments against Sage's Liability Provision mentioned above, Staff emphasizes that one option in SBC's Liability Provision would, in fact, enable Sage to virtually eliminate its liability for uncollectible ABS charges. *Id*., at 17. Specifically, Staff points to Option 1 in the SBC proposal, which would allow Sage to utilize Toll Billing Exception ("TBE") to block ABS traffic to Sage customers[[28]]. Staff

[26] The Commission notes, however, that Sage does send reminder notices regarding past due ABS charges. Tr. 292 & 294 (Timko).

[27] Calling SBC's Texas offer "far less generous" is putting it mildly. Given SBC's present estimate of average industry ABS uncollectibles at 15%-20%, SBC was proposing that Texas CLECs beat that purported average by 50%.

[28] Although SBC implements TBE, SBC's Option 1 would require Sage to request that SBC do so. TBE can be applied to any or all of a CLEC's customers. Tr. 222 (Smith). However, SBC's Option 1

stresses that TBE would be applied without cost to Sage. Furthermore, Staff charges, when Sage declines to block ABS traffic, it becomes "complicit in letting ABS customers evade payments for ABS services. Such behavior is inequitable to the providers of ABS services, and equally inequitable to those ABS customers that do pay their ABS bills." *Id*., at 22.

b. Commission Analysis and Conclusion

The parties' competing contentions about whether Sage or SBC bears greater responsibility for, or derives greater benefit from, such traffic merely underscore the interconnected nature of telecommunications. Both carriers, as well as their respective local exchange customers, accept duties and derive value from ABS calling. The Sage customers that receive such calls – most typically, the relatives and friends of incarcerated persons[29] - surely perceive value in their telephone contacts with the inmates initiating those calls (or they would decline to accept them). Sage correspondingly benefits from allowing access to such calls (or it would block them). SBC, by determining the charges and reaping the financial proceeds of ABS traffic, clearly receives benefit from the decision of Sage customers to accept that traffic (or it would selectively block such traffic). It follows that, as a general principle, the allocation of responsibility for uncollectible ABS charges should be shared, as SBC and Staff advocate, rather than left entirely to the initiating carrier[30]. While compelling circumstances might cause us to deviate from that general principle, we do not find such circumstances here.

We recognize that the Texas Commission elected to assign all responsibility for ABS uncollectibles to the SBC affiliate in that state. However, the circumstances here differ in important respects from those before the Texas Commission. Texas did not have, as we do, evidence of Sage's utterly unsatisfactory record regarding collection of ABS charges. The Texas Commission presumably believed that Sage would act diligently to accomplish what that Commission called the "mutual goal" of all competitors to collect payment for ABS. But SBC's testimony, which Sage does not controvert, shows that has not been the case. Instead, Sage's ABS collection record has been so poor that we can only infer that Sage requires a financial incentive to elicit its best efforts toward realization of the "mutual goal" – and mutual benefit – associated with recovering ABS charges.

Additionally, as already noted, SBC's Texas affiliate offered to accept only 10% of the burden of ABS uncollectibles there. In the instant proceeding, SBC proposes options that would assign financial responsibility for 30% to 35% of uncollectible ABS charges to SBC. Without indicating at this juncture whether that allocation is

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apparently contemplates that all of Sage's customers would be blocked, in order to approach complete elimination of ABS uncollectibles.

[29] Tr. 395 (Burgess (specific numbers confidential). In the Texas Arbitration Order, at 200, a CLEC estimated that 75% of ABS traffic starts at prison telephones.

[30] *Cf*., Texas Arbitration Order, at 214 ("Ensuring that customers pay for collect calls they choose to accept, whether or not such calls originate in prison facilities, should be a mutual goal of all competitors").

appropriately balanced, the Commission does find that SBC has moved beyond what it asserts is the industry average and substantially beyond its Texas offer. The rationale of the Texas Commission – that the compensation proposed there for billing and collection was insufficient to justify imposing bad debt risk on the CLEC[31] – loses it force when that risk is significantly reduced.

With respect to Sage's concern for its financial viability, as well as its capacity to provide competitive telecommunications services in Illinois, the Commission agrees with Sage that these are important considerations under the Illinois Public Utilities Act. Sage Rep. Br. at 27-28. However, Sage's financial health should not be inconsistent with a properly calibrated allocation of responsibility for ABS charges. Our intention in this Decision is only to create a fair incentive, in the form of a financial risk that is both reasonable in magnitude and avoidable in practice, to meaningfully involve Sage in the recovery of ABS charges. It is in the public interest that an interconnected telecommunications provider/competitor take on that reasonable risk, so that calls voluntarily accepted by its subscribers – calls that provide benefit to each interconnected carrier[32] - are paid for. Putting that conversely, it is not in the public interest to create a context in which an interconnected carrier can be indifferent to call payment. Such a carrier would, in effect, be enjoying a subsidy from the carrier that absorbed the burden of nonpayment. A carrier's financial viability should not be dependent upon that sort of subsidy (and we trust that it is not Sage's intent here).

Additionally, the Commission observes that it is Sage that puts the local exchange customer on the network without establishing the customer's creditworthiness[33]. We recognize Sage's explanation that it does not perform credit checks because it requires customers to prepay their monthly service, Sage Rep. Br. at 22, and we do not criticize that business practice. Nonetheless, that valid practice does not include prepayment of ABS charges, Tr. at 298 (Timko), so that the providers of ABS origination services are vulnerable to Sage customers whose credit standing has not been vetted.

Accordingly, the Commission generally resolves Sage Issue 2 by concluding that Sage should accept an appropriately calibrated measure of financial responsibility for ABS charges originated through SBC, under fair terms and conditions. Therefore, we must reject Sage's proposal to include Sage's Liability Provision in the Sage-SBC ICA, because that provision shields Sage from any financial responsibility for ABS uncollectibles.

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[31] We note that the Commission does not necessarily agree with that rationale. Its validity would be best determined by a cost analysis. The cursory cost estimates of the parties here do not rise to the level of a cost analysis.

[32] Again, Sage (like SBC) derives benefit from the inflow of ABS traffic to its local exchange subscribers. As Sage recognizes, the ability to receive such traffic is part of "the full array of telecommunications services" that its customers expect. Sage Rep. Br. at 27. Moreover, if Sage believed otherwise, it would not object to blocking the inflow of ABS traffic (an option included in SBC's Liability Provision).

[33] However, Sage does limit itself to customers that have active – that is, non-disconnected – accounts with other carriers. Tr. at 297 (Timko).

To determine the specific allocations, terms and conditions that will govern ABS traffic, we turn to the parties' proposed appendices to the ICA[34]. Sage's proposed Appendix[35] is a mark-up of SBC's proposed Appendix[36], and now includes Option 1 of the latter appendix, because that option has been revised to address certain Sage objections. Sage Init. Br. at 5. Before the addition of SBC's Option 1, Sage's proposed Appendix contained two principal options.

Under Sage Option 1, SBC would directly bill Sage end-users for ABS charges, using customer information provided for a fee by Sage. We have already noted SBC's and Staff's concern that direct billing to Sage's local exchange customers will sow customer confusion. We have also already noted SBC's objection about additional billing duties and costs. Nevertheless, the Commission observes that since any telecommunications customer can call any other (absent blocking), every carrier and customer has to address the resulting billing (and billing cost) responsibilities associated with such universal interconnectivity. Moreover, new carriers regularly enter the telecommunications marketplace, and existing carriers exit, thereby creating billing and billing cost consequences for other carriers.

Consequently, we do not embrace the general proposition that carriers and customers are typically confused by charges from diverse carriers (whether on a single bill from their LEC or on separate bills from different providers). Nor do we find that, as a general proposition, carriers' direct billing costs are exceptional. The specific evidence in this record consists of the parties' dueling assertions, without substantial supporting data. Therefore, the Commission does not reject in principle Sage Option 1, which contemplates direct billing by SBC. Instead, we find that direct billing by SBC can reasonably be included in the Sage-SBC IAC as an option that SBC can select at its discretion.

Sage Option 2 is another story. Because it would shield Sage from any responsibility for ABS uncollectibles, it is objectionable in principle, for reasons already articulated. Furthermore, it would authorize Sage to retain half of all ABS charges *collected*. Sage offers no rationale for what amounts to a revenue-sharing plan, that would operate *in addition to* an ABS billing and collection fee provision that dramatically exceeds what SBC describes as industry custom[37], SBC Ex. 1.0 at 20, and the Commission can imagine no such rationale.

SBC's proposed Appendix contains three options. Option 1 is acceptable to Sage, as previously noted[38]. Option 1 contemplates two forms of call blocking – TBE,

[34] Sage presents its Appendix as an alternative only the event that its preferred options are rejected (as they are in this Decision); SBC's proposed Appendix is its preferred option.
[35] Exhibit 3 to the Petition.
[36] Attachment 1 to SBC Ex. 1.0 (Smith Direct).
[37] Sage challenges SBC on this point. Sage Ex. 2.0 at 8.
[38] However, after specifically adopting SBC Option 1 as a "modification" to its own proposed Appendix, Sage Init. Br. at 5, Sage casts doubt on its intentions by later criticizing SBC Option 1. Sage Rep. Br. at 26-28. Sage's criticism does focus on Option 1 "in the context SBC's proposed ABS Appendix," but it is not clear how or why that context alters the operation of SBC Option 1.

which would block all ABS calls flowing to Sage local exchange customers, and selective blocking of outgoing calls from certain inmate facilities, which will prevent collect calls from those facilities unless a pre-paid account is established. SBC Init. Br. at 21-22. Staff also indicates approval for SBC Option 1. Despite the apparent unanimity of the parties regarding this option, the Commission would not endorse it if inmates were completely barred from originating calls. Inmates have certain rights of access to legal counsel, and some are parents who remain in contact with, and responsible for, their children. However, the availability of prepayment mechanisms addresses these concerns. Consequently, the blocking provisions in SBC Option 1 offer one reasonable solution to the problems arising from ABS uncollectibles.

Under SBC Option 2, Sage could return to SBC, without financial liability, up to a maximum of 35% of all of SBC's rated ABS messages and applicable taxes during a given bill period. Further, "Sage would also be obligated to implement full TBE blocking for an end user customer who is 60-days in arrears for any ABS charges." *Id*., at 22. Sage would also bear no financial responsibility for ABS unbillables and rejects[39], or for any adjustments SBC might authorize to a customer's bill. In short, Sage would be exposed to liability for 65% of undisputed ABS traffic received from SBC, while SBC would be at risk for the remaining 35%.

SBC Option 3 contemplates that Sage would purchase SBC's ABS accounts receivable at a 30% discount. Sage would then recover ABS charges from its end-users (whether through bill collection, imposition of an ABS availability charge or some other mechanism) and, presumably, hope to collect more than the 70% of ABS charges that it pays to SBC. If it fell short of the 70% mark, Sage would absorb the loss. As with SBC Option 2, SBC would remain responsible for unbillables, rejects and SBC adjustments. Sage would have the option to direct SBC to selectively block inmate facilities.

According to SBC, the liability allocations in Options 2 and 3 are fair and reasonable when viewed in light of "industry average uncollectible rates for ABS calls…typically in the range of fifteen…to twenty…percent…assuming that Sage implements reasonable methods and procedures for collecting ABS charges from its end users." *Id*., at 23. Sage responds that SBS's purported industry standards are "mythical" and that "SBC has not provided any foundation for its claims that the alleged

[39] Under SBC's ABS Appendix, "'Unbillables'" are defined as rated value of ABS messages that are not billable to the CLEC end-user because of missing information in the billing record or other billing errors (not the result of the CLEC's error) that are returned to SBC by mean of the [Daily Usage Feed]. 'Rejects' are messages that fail to pass edits in the CLEC's billing system, including messages that do not pass due to (1) the age of the call; (2) missing information; (3) incomplete information; and (4) Automatic Number Identification ('ANIs') that do not belong to the CLEC. Section 8 of the ABS Appendix establishes a process whereby the CLEC is allowed to submit Unbillables and Rejects to SBC and provides that if SBC is unable to correct the billing record, the CLEC's account will be appropriately credited. This credit for Unbillable and Rejects is in addition to the Uncollectibles that Sage would be permitted to recourse to SBC Illinois under Option 2. Moreover, the Unbillables and Rejects are deducted from the number of rated billed ABS messages to which the 35% is applied in calculating the cap on Uncollectibles…[citations omitted]." SBC Init. Br. at 22, fn. 8.

industry standards or practices even exist." Sage Rep. Br. at 17. SBC responds that its testimony concerning industry standards is derived from its witnesses' experience and expertise. SBC Rep. Br. at 10.

For our purposes here, the parties' quarrel regarding "industry standards" has limited utility. An industry "average" (rather than "standard") for recovery of ABS charges would be one useful point of comparison as we attempt to fairly and reasonably allocate the risk of ABS uncollectibles. Inherently, such an average exists, but, as Sage contends, the record does not contain a basis for determining whether SBC's 15%-20% range is derived from the data that would have to be assembled to calculate that average. Accordingly, the Commission must regard SBC's testimony as the approximations of two industry professionals, not as calculations supported by data.

There is another point of comparison in the record, however, that stands on firmer footing. SBC witness Burgess states that "SBC incurs between 10 and 20% bad debt when looking just at ABS calls on its own end user bills." SBC Ex. 2.0 at 13. Because this uncontroverted quantification concerns the witness's own organization, not a larger and more diffuse "industry," it has greater evidentiary reliability. While this quantification does not, by itself, tell us whether SBC's and Sage's customers are sufficiently similar to expect similar results, we note that some significant number of Sage's future customers will be SBC's present local exchange subscribers, once Sage commences service in what had formerly been SBC's exclusive local service territory. This permits the inference that Sage can approximate SBC's ABC collection rate when Sage "acquires" those customers. This inference is strengthened by the fact that "SBC bills its own customers for [both] SBC ABS…and…ABS received *from other CLECs and ILECs*. *Id*., at 16 (emphasis added). This shows that SBC has not achieved its collection rate by controlling both ends of all ABS traffic.

Moreover, in order to conclude that SBC Options 2 and 3 are reasonable, we need not find that Sage's potential collection rates would precisely replicate the SBC results set forth above. SBC Options 2 and 3 allow Sage to experience an uncollectibles rate that is at least 50% higher than the high end of SBC's own range. Therefore, the Commission concludes that SBC Options 2 and 3 are, in general, reasonable provisions for allocating the financial risk of ABS uncollectibles.

Accordingly, the Sage-SBC ICA should include an appendix consisting of SBC's proposed Appendix, supplemented by Sage Option 1 (enumerated as Option 1 in Section 2 of SBC's proposed Appendix, with the three SBC options renumbered accordingly). SBC can select Sage Option 1 at its sole discretion and, only if SBC declines to do so, Sage can then select the proposed SBC option that it prefers.

Additionally, the Commission will require several other revisions to SBC's proposed Appendix, in order to balance the parties' responsibilities more reasonably. First, the discount rate associated with SBC Option 3 should be changed. SBC advances no rationale for accepting recourse for 35% of uncollectibles under Option 2, but extending only a 30% discount on receivables under Option 3. Given our objective

of a fair and reasonable allocation of risk, for the purpose of establishing sufficient incentives for Sage to improve upon its unacceptable ABS collection performance, we perceive no reason to make Option 2 more attractive than Option 3. Indeed, Option 3 is already less attractive, since Sage would receive billing and collection fees under Option 2, as well as recourse for 35% of ABS charges, but no such fee under Option 3[40]. Accordingly, we will revise Option 3 so that it will require Sage to pay only 65% of the charges pertinent to that option.

Next, we require that the final sentence of Section 2.3 be revised to apply the five-cent billing and collection fee to messages originated by third-party LECs (so that the sentence would end as follows: "…for ABS calls originated on SBC 13-STATE's network and calls originated be a third party LEC"). The billing and collection services Sage would perform for third-party LEC calls are no different than the services performed for SBC-originated calls.

Next, as Sage requests, we direct that the words "for consideration of" be removed from subsection 1.4 of SBC's proposed Appendix. That language gives SBC unnecessary and potentially problematic discretion. Adjustments should be made when required by the language of subsequent sections of the Appendix, and not be made unless so required.

Next, section 6 of SBC's proposed Appendix should be supplemented by section 6 of Sage's proposed Appendix. The Commission agrees with Sage that SBC is in the better position to handle customer inquiries, complaints and disputes. The pertinent call details – applicable tariffs and rates, timing of calls, assumption of responsibility by the recipient – are in SBC's possession. Sage Init. Br. at 16. Sage can do little more in response to a customer inquiry than say, in effect, "because SBC said so." Indeed, SBC's own proposal contemplates that Sage will refer disputes to SBC for investigation. Moreover, Sage would not have authority to adjust or waive SBC's ABS charges. Sage Ex. 2.0 at 20. Thus, while Sage should share responsibility for ABS billing and collection, it should not bear the unnecessary and counter-productive burden of receiving and relaying customer complaints. Therefore, SBC should provide a toll-free number, which should appear prominently on Sage's bills, for resolution of ABS-related customer inquiries.

However, if Sage selects SBC Option 3, responsibility for customer inquiries should fall upon Sage, with assistance from SBC, as SBC's proposed section 6 provides. In that instance, Sage will have taken SBC's receivables as its own. Sage will then have the power to adjust or waive charges. Therefore, Sage's proposed section 6 will supplement, not replace, SBC's section 6 – so that the latter will apply if Sage selects SBC Option 3.

The foregoing revisions to Section 6 will necessitate modifications to Section 4 of SBC's proposed Appendix. The third item appearing under subsection 4.2

[40] SBC may be suggesting otherwise in its Initial Brief at page 23. However, no such fee is mentioned in subsections 2.4 and 2.4.2.1 of its Appendix. *Compare*, subsections 2.3 and 2.3.2.1 of that Appendix.

("[r]esponding to customer complaints, inquiries and disputes as set forth in Section 6.0 of this Appendix"), must be edited so that CLEC-provided collection services include this component only when Sage selects SBC Option 3. Conversely, the fourth item under subsection 4.2 ("[r]emitting net proceeds to SBC-13STATE") should be inapplicable when Sage selects SBC Option 3, since Sage will retain the "net proceeds" of its collection efforts.

Finally, per Sage's request, the word "may" in subsection 8.1 of SBC's proposed Appendix should be replaced with the word "will." When SBC is provided with "timely and properly returned Unbillables and Rejects as defined herein," corresponding adjustments should not be discretionary.

In sum, the Commission resolves Sage Issue 2 by assigning to Sage a measure of the financial risk associated with ABS traffic, under the terms and conditions set forth above[41].

B. OPEN ISSUE PRESENTED BY SBC

1. SBC Issue 1

Sections 29.3, "Amendment or Other Changes to the Act; Reservation of Rights," and 29.4, "Regulatory changes of the ICA," as set forth in Exhibit 2 to Sage's Petition, should be replaced with the language included in Attachment 1 to this Response.

As framed above, SBC wants this Commission to replace Sections 29.3 and 29.4 of the ICA attached to the Petition (Sage's "intervening law provisions") with text attached to SBC's Response. After Initial Briefs were filed by the parties, SBC proposed two new versions of replacement language for the intervening law provisions. SBC Rep. Br., Attach's A & B. The first of these apparently supersedes the text attached to the SBC Response.

SBC's concern is that Sage's intervening law provisions "might incorrectly be construed to limit the changes in law for which a party may seek to amend the ICA to…'action' that occurs only *after* the [e]ffective [d]ate of the [a]greement." SBC Rep. Br. at 19 (emphasis in original). For that reason, SBC contends that the intervening law provisions in Sage's Exhibit 2 should be replaced to:

> …make it clear that either Party has the right to invoke change in law to negotiate any conforming modifications

[41] While each arbitration under the Federal Act is resolved on its own merits, it is also true that subsequent arbitrating parties will cite previous arbitration decisions in support of their positions. For that reason, the Commission notes that the instant arbitration involves ABS billing and collection by a CLEC that provides local exchange service using the UNE-P. Facilities-based and reselling CLECs use different platforms and present certain distinct issues.

> which may be needed to the ICA as a result of any government actions which may have or which do occur *prior to the effective date of the ICA* including, without limitation, as to the USTA decision[42] and the TRO[43], in addition to any government actions which may occur upon or following the effective date of the ICA.

SBC Init. Br. at 31 (emphasis in original). As evidence that Sage's intervening law provisions are "outdated," SBC stresses that Section 29.3 contains a reference to an FCC decision that was vacated by the USTA decision. *Id*., at 30. Alternatively, if the Commission declines to replace the intervening law provisions as SBC proposes, then SBC "requests that the Commission grant an extension of this proceeding to allow the parties to negotiate any changes that may be needed to conform the ICA to the TRO." *Id*., at 32, fn. 14.

Sage responds that SBC's originally proposed text (as attached to SBC's Response) is both unnecessary and intended to undermine this Commission's authority to impose state UNE unbundling requirements. With regard to the absence of necessity, Sage underscores the following language in Sage's intervening law provisions:

> Sec. 29.3 Amendment or Other Changes to the Act; Reservation of Rights…*In the event of any amendment of the Act, or any legally binding legislative, regulatory, or judicial order, rule or regulation or other legal action that revises or reverses the Act*, the FCC's First Report and Order in CC Docket Nos. 96-98 and 95-185 or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an "Amendment to the Act"), *either Party may by providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement.*
>
> 29.4 Regulatory Changes. *If any legally binding legislative, regulatory, judicial or other legal action (other than an Amendment to the Act, which is provided for in Section 29.3) materially affects any material term of this Agreement or materially affects the ability of a Party to perform any material*

[42] United States Telecom Association, et al., 290 F.3d 415 (D.C. Cir. 2002).
[43] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 (FCC 03-36).

> *obligation under this Agreement, a Party may, upon written notice, require that the affected provision(s) be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new provision(s) as may be required; provided that such affected provisions shall not affect the validity of the remainder of this Agreement*….

Sage Init. Br. at 31-31 (emphasis by Sage). In Sage's view, the foregoing provisions will enable the parties to accommodate any intervening law that might affect the Sage-SBC ICA.

Regarding SBC's purported intention to constrain UNE unbundling under state law, Sage points to the following text in SBC's proposed replacement for Sage's intervening law provisions:

> *SBC ILLINOIS shall have no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and CLEC's own elements or UNEs in commingled arrangements beyond those required by the [Federal Communications] Act*, including the lawful and effective FCC rules and associated FCC and judicial orders. The preceding includes without limitation that *SBC ILLINOIS shall not be obligated to provide combinations (whether considered new or existing) or commingled arrangements involving SBC ILLINOIS network elements that do not constitute required UNEs under 47 U.S.C. § 251(c)(3)* (including those network elements no longer required to be so unbundled), or where UNEs are not requested for permissible purposes.

Sage Init. Br. at 28 (emphasis by Sage). Sage argues that the quoted text would limit "the unbundling requirements on SBC to only those deemed appropriate by the FCC. This finding would run directly counter to the clear and express requirements under" provisions of Section 13-506[44] and 13-801[45] of the Illinois PUA. *Id*., at 29-30.

Staff generally concurs with Sage that the "language of the existing [i.e., Sage's] [S]ection 29.4 along with the language of 29.3 already provides a sufficient mechanism to address SBC Illinois' concerns regarding its intervening law rights." Staff Rep. Br. at 9. Regarding SBC's concern that regulatory changes occurring shortly before the effective date of the Sage-SBC ICA might fall outside of Sage's intervening law provisions, Staff, "as a compromise, proposes modifying Section 29.3 by deleting the

[44] 220 ILCS 5/13-505.6 (the Commission can require unbundling "based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act").

[45] 220 ILCS 5/13-801(d)(4) ("a telecommunications carrier may use a network elements platform consisting solely of [UNEs] of the [ILEC] to provide end to end telecommunications service….")

words 'the Effective Date' at the end of the first sentence in Section 29.3 and replacing them with 'February 19, 2003'". *Id*., at 10. That revision would enable either party to the ICA to assert that governmental action occurring after that date constituted intervening law.

Further agreeing with Sage, Staff also avers that SBC's originally proposed replacement language "would effectively eviscerate any independent state authority regarding unbundling of network elements or any other independent state law requirements." *Id*. Staff maintains that federal law does not preclude state unbundling and that "the Commission has already decided this issue" in a manner contrary to SBC's position. *Id*., at 11.

As already stated, SBC revised its original replacement text after the foregoing arguments were presented by Sage and Staff. SBC removed the language specifically addressing unbundled UNEs (quoted above), to which Sage and Staff object. SBC Rep. Br., Attach. A. The Commission believes that deletion was a prudent choice, because we agree with Sage and Staff that the deleted text would have undermined our state unbundling authority, in derogation of both federal and state law.

Important deficiencies remain in SBC's revised replacement language, however. First, SBC proposes that:

> If any action by any state or federal regulatory or legislative body or court of competent jurisdiction invalidates, modifies, or stays the enforcement of laws or regulations that were the basis or rationale for any rate(s), term(s) and/or condition(s) ("Provisions") of the Agreement and/or otherwise affects the rights or obligations of either Party that are addressed by this Agreement, specifically including but not limited to those arising with respect to the Government Actions, the affected Provision(s) shall be *immediately invalidated, modified or stayed* consistent with the action of the regulatory or legislative body or court of competent jurisdiction upon the written request of either Party….

Id. In contrast to the *immediate* disability imposed by the foregoing text, Sage's intervening law provisions provide for good faith renegotiation between the parties, at the discretionary request of either party. Because it would not immediately disrupt the working relationship created by the ICA, Sage's proposal is markedly superior. It would allow the parties a reasonable opportunity to consider the ramifications of regulatory change and arrange for a smooth transition accommodating such change. Moreover, no transition may be warranted, since changes to regulatory requirements and standards do not always obligate carriers to rearrange the rights and duties they established by contract. Indeed, SBC's other new proposal (in Attachment B to its Reply Brief) contemplates good faith negotiation, not immediate invalidation, in the event of regulatory change.

Next, Staff raises an apt concern regarding the second sentence in SBC's proposed text, which refers to extant regulatory actions "which the parties have not fully incorporated into this Agreement." Staff Init. Br. at 9. While SBC's intention is not entirely clear to us, this language could be interpreted to undo any or all of the ICA's provisions on the basis of law which was *known and unchallenged* – and therefore, should have been taken into account - at the time the ICA was entered into. The Commission does not want ICAs, which are intended to provide stability among interconnected competitors, to rest on such a precarious foundation.

Accordingly, the Commission will reject SBC's proposed replacement language, even as revised, and approve instead Sage's intervening law provisions. We will modify Sage's proposal, however, in response to SBC's legitimate concerns. First, as Staff recommends, we will revise the first sentence of Sage's proposed Section 29.3, to reflect that the parties based their ICA on applicable law extant as of February 19, 2003[46]. With that change, either party can assert that regulatory actions after that date constitute intervening law[47]. We observe that SBC's other new proposal (Reply Brief, Attach. B) also identifies February 19, 2003 for the same purpose.

Second, we concur with SBC that Sage's intervening law provisions contain certain outdated references. Indeed, "Sage also has concerns" about listing past regulatory proceedings in the ICA. Sage Init. Br. at 32-33. Consequently, the Commission will delete the specific citations in Sage's Section 29.3 (which will necessitate minor revisions elsewhere in the text). Such specific citation is unnecessary because the more general provisions of Section 29.3 provide the operative mechanisms for determining what is, and is not, covered by that section. With our modifications, the intervening law provisions in the Sage-SBC ICA will include, in addition to Sage's proposed Section 29.4, the following version of Section 29.3:

> 29.3 Amendment or Other Changes to the Act; Reservation of Rights. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of February 19, 2003. In the event of any amendment of the Act, or any legally binding legislative, regulatory, or judicial order, rule or regulation or other legal action that revises or reverses the Act or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an "Amendment to the Act"), either Party may by providing written notice to the other Party require that the affected provisions be renegotiated in good

[46] That is one day before the FCC issued a press release and adopted the *TRO* Order (which was formally released on August 21, 2003).
[47] To be clear, the Commission is not pre-approving this assertion. We will make no such ruling unless and until the question is properly presented in a formal dispute.

> faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement. If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its rights and remedies with respect to the collection of such rates or charges on a retroactive basis; including the right to seek a surcharge before the applicable regulatory authority. In the event that such new terms are not renegotiated within ninety (90) days after such notice, or if at any time during such 90-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 28.3 of this Agreement. For purposes of this Section 29.3, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed. The Parties further acknowledge and agree that by executing this Agreement, neither Party waives any of its rights, remedies, or arguments with respect to any legislative, regulatory, or judicial order, rule or regulation or other legal action and any remand thereof, including its right to seek legal review or a stay pending appeal of such legislative, regulatory, or judicial order, rule or regulation or other legal action, or its rights under this Section 29.3.

Concerning Attachment B to SBC's Reply Brief, we are not certain whether SBC is proposing adoption of the text in its entirety or merely demonstrating that we approved the use of February 19, 2003 as a demarcation date in a previous arbitration[48]. If SBC intends the latter, we have already decided to embed that date in the Sage-SBC ICA. If SBC intends the former, the Commission declines to consider adoption of that text in this proceeding. Irrespective of whether that language has been approved for a different ICA involving another party, Sage and Staff have had no opportunity to consider or comment upon the suitability of SBC's text - which was first presented in SBC's Reply Brief – to the particular circumstances of this case.

In sum, with respect to SBC Issue 1 to the Commission will not replace Sage's Sections 29.3 and 29.4, as set forth in Exhibit 2 to the Petition, with text presented by SBC in this proceeding. However, Sage's Section 29.3 will be modified as set forth above, and incorporated in the Sage-SBC ICA along with Sage's Section 29.4.

IV. ARBITRATION STANDARDS

Under subsection 252(c) of the Federal Act, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports

[48] AT&T Communications, Inc. et al., Docket 03-0239 (Aug. 26, 2003).

with three standards. The Commission holds that the analysis in this arbitration decision satisfies that requirement.

First, subsection 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission has directed the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues will affect those or other rates in the parties' interconnection agreement, we require, and expect the parties to establish, rates that are in accord with subsection 252(d) of the Federal Act.

Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 15 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to subsection 252(e) of the Federal Act.

By order of the Commission this xx day of December, 2003.

(SIGNED) EDWARD C. HURLEY

Chairman

SIMULTANEOUS BRIEFS ON EXCEPTIONS DUE BY NOON ON DECEMBER 1, 2003.